result of that is that the juror is by that means to some extent intimidated or is likely to be, and we feel that such a method of interrogation of neighbors, relatives, to be entirely improper, likely to put the juror into the frame of mind that they are living in some sort of police state, and to destroy their effectiveness as fair, independent and impartial jurors.

"Now, I would like to say to your Honor, that I don't make this motion without the definite belief that I am correct in my statement to you. If your Honor should see fit to hold a hearing on it, we would be willing to undertake to produce proof of these assertions. If, for instance, we could have until tomorrow morning to do so.

* * * * * *

"Mr. Abelove: If your Honor please, I should like to join in Mr. Shanahan's motion in behalf of defendant Merlini and further call to the Court's attention that in one incident that has been called to my attention, *several of these troopers came into a very small hamlet in our County, and operated more or less out of a hotel, so that the entire community was aware that there were a group of state officers checking jurors for this case.* It was no secret, apparently around the hotel as to the objective, and any juror living in that community was certainly aware of the fact that at least in that hamlet, it had become a police state, insofar as this case is concerned.

"I join with Mr. Shanahan in stating to the Court that the effect on a juror's mind after that type of investigation, either a man in uniform or having identified himself as being a member of the State Police, can give these defendants, or at least defendant Merlini anything, but a fair trial, and I too, want to join with Mr. Shanahan in asking for a hearing on this" (fols. 131-137). (Italics added.)

In response to said motion the following colloquy took place:

"The Court: Do you want to be heard, Mr. Fischer?

"Mr. Fischer: Yes, sir. There are two immediate matters that arise in my mind, your Honor. First of all, the assertion here made, one assertion in particular made by Mr. Shanahan, where he was informed by his co-counsel and apparently was informed by somebody else about inquiries in connection with people of Italian extraction. Their feeling in that regard. *I am certain, I would say that that did not occur.* There is no doubt, however, and it is customary, as your Honor well knows, to check out a jury list, and in some instances, as your Honor is aware, this jury list and other jury lists have come through with people who have felony and misdemeanor convictions. So, it is vital, of course, that the jury list be checked.

"Now, the other problem that is of concern to me is this, that the investigation of the jury list was completed *on our part* in excess of two weeks ago. As your Honor is aware, this matter has been adjourned and now, at the date that the trial is ultimately to start, after adjourning the date when the trial is to commence at the request of defense counsel, we have no papers here of any kind, and I don't see how this could be tested in any way without papers other than statements of counsel allegedly on information afforded by somebody unnamed. So, your Honor, based on that, and these matters, none of which have ever come to my attention, I don't feel that there has been any showing made here in any sense of the word, any legal showing, and the motion should be denied" (fols. 138-141). (Italics added.)

In respect to the response that the charge was made "without papers" counsel for the defense said:

"While the Code of Criminal Procedure requires that a challenge to the array, within the proper meaning of that term, be in writing I can find no requirement that such a motion as this be in writing, but let me say this to the Court, that if your Honor would give us an opportunity to—to obtain some proper proof by way of affidavits, we would be glad to do that. But, we would need some time, of course, to do it" (fol. 144).

The Trial Court first resolved the problem presented as follows:

> "It occurs to the Court that if any—any influences of any kind were brought to bear, or were felt by any of these prospective jurors, that of course is a proper subject of inquiry by counsel in their examination of the individual jurors. It seems to me that that examination would give full opportunity to any of the parties to ascertain whether the jurors' minds were influenced in any way by these inquiries that were made. That that examination would give an adequate opportunity for such an inquiry and that being so, I would be inclined to deny defendants' motion here • • •" (fols. 146-147).

Speaking against this solution, counsel for the defense said:

> "While I appreciate that this undoubtedly, in the event your Honor would deny our motion, would certainly be a matter which we would pursue in the examination of the jurors, I would say the whole purpose, for instance, of having this hearing in the absence of the jury, would be completely destroyed if we are called upon to openly question the jurors in that regard, because we have no way of knowing that it has come to the attention of all of the jurors that they have checked, and we are certainly going to make that crystal clear to them if we are obliged to examine them in the presence of the others" (fol. 148).

The prosecution argued for this solution:

> *"Now, if inquiry is made and they know that that inquiry is made as to their qualifications to sit, I see no harm by it. I don't know how you would preclude it to it possibly coming to their attention"* (fols. 149-150). (Italics added.)

The Trial Court did not deny defense counsel's motion on the ground urged by the prosecution, that it was not then substantiated by "papers." The Trial Court assumed the facts stated by defense counsel to be correct (fol. 150).

The Trial Court denied the motion on the grounds (1) that there was no "direct showing that there was some improper approach to these jurors *themselves*" (counsel for the defense having previously admitted that no claim was made "that any contacts were made by any representatives of the Assistant Attorney General's office with prospective jurors themselves") (fols. 144-145) and (2) that it was a situation which the Trial Court thought could properly be "explored in the examination of the jurors" (fols. 150-153). The Trial Court said:

> "Well, the Court's position would be in the absence of a showing of some influence being brought to bear from some source *on any one of these individual jurors*, in the absence of such a showing, *there is no basis for any action on the part of the Court*. Whatever the talk in the neighborhood might have been, whatever the talk in the community might have been, and it is fair to assume, as I say, in a case of this sort, in this kind of community, that there would be plenty of talk, in the absence of some showing that some of this talk was brought to these jurors' attention, and in the absence of some showing that the jurors were in some measure influenced by it, *it doesn't seem to me that the Court is called upon, at this point, to take any action with reference to the qualifications of the panel.*
>
> "Mr. Abelove: Well, if your Honor please, as I understand it, we are seeking just that opportunity.
>
> "The Court: Well, you will be afforded the opportunity, Counsel, on the examination of jurors.
>
> "Mr. Abelove: *Well, by that time, the entire matter is before the panel*" (fols. 156-158). (Italics added.)

The Court did not hold the requested hearing (1) as to the nature and scope of the investigation the State Police made of the jurors (after they had been investigated, drawn and certified to the Court as qualified by the Commissioner of Jurors), (2) as to the extent that the nature and scope of such investigation was communicated to the jurors, and (3) as to whether such presumptively preju-

dicial conduct was harmful to defendant. The members of the State Police assigned to the staff of the prosecution who made the challenged investigation were not called and interrogated by the Court (New York Code of Crim. Proc., Sec. 367); nor, was any one of whom they made inquiry as to a juror examined by the Court. The prosecutor was not called upon to disclose his conduct and the conduct of his staff and, although the conduct charged to him and his staff was not denied, no justification was offered other than stated above and no further explanation was required by the Court (cf. New York Code of Crim. Proc., Sec. 366). Thus, counsel for defense were required to explore in a very limited way this intrusion by the State Police on the privacy of the jury by examinations in the presence of the panel of the members thereof.

Thereupon defense counsel was required to examine the prospective jurors on *voir dire*. One juror, when asked whether it had come to his attention that any inquiry had been made as to his qualifications as a juror, first answered yes and then no (fol. 222). Later, he sought to clarify his answers by saying:

> "Well, the other attorney asked a question there, but I don't think it was properly phrased. He asked me if anyone had investigated my qualifications as a juror. I was investigated by, I believe, members of the State Troopers, but they didn't investigate my qualifications as a juror. *They investigated my sobriety and habits, and I don't think that these are necessary juror qualifications.* So therefore, I say yes, and then no, to his question" (fol. 236). (Italics added.)

When asked if knowledge of such investigation had any effect upon him he said:

> "No, sir. *I have complete faith in the integrity of our New York State Police,* and would have no bearing on any decision I might make" (fols. 237-238).

Another juror was examined and answered as follows:

"Q. Now, has it by any chance come to your attention as to whether any investigation was made before you came here about your qualifications to serve? A. Oh, yes.

"Q. You did learn that some investigation was made? A. Well, I was—a neighbor, something said about jury duty, but nothing more or less.

"Q. Well, did you get some information that some inquiry had been made about you from your neighbors? A. Yes.

"Q. Well now, let me ask you, Mrs. Head, would that make any difference to you? A. *No, I was honored.* It didn't affect me at all" (fol. 267). (Italics added.)

Another was asked:

"Now, has it, Mr. Eisenhut, come to your attention at all that any previous investigation has been made about your qualifications to serve here? A. Yes. I knew like some of my neighbors, they said that they had been asked questions about me, but that is as far as it went, you know.

"Q. Well, does that make you feel any differently about serving as a juror here? A. No, no" (fol. 310).

Later he was asked:

"Q. And there is nothing in your mind, sir, concerning this investigation that was made of you, as to your qualifications to serve as a juror? A. No, there isn't. *You know, I was sort of surprised that they would—you know, pick me for some reason.*

"Q. I see. And there is nothing about that that makes you feel that you have got to answer to anybody about your own conscience? A. No, that is right" (fol. 328). (Italics added.)

Juror Mrs. Rita A. Maloy was asked if it had come to her attention that a special investigation had been made with reference to her qualifications as a juror and she an-

swered: "I was told by a neighbor that I was investigated" (fol. 353). She denied that the fact she was investigated would have any effect upon her (fols. 354-356). It is to be noted that this investigation took place during the "Christmas holiday season" immediately prior to January 4 when the jurors were required to report (fols. 355-356). *Mrs. Maloy also testified that her neighbors told her that the investigation was made by a State Trooper* (fol. 363). *At the time Mrs. Maloy was an employee of the State of New York and her husband had been so employed for twenty-four years* (fols. 372-373).

Juror Glen Hutchinson, who had been a county officer for ten years (fol. 390), said that he did not know of the investigation made of him (fol. 394).

Juror Victor Basile testified that about a week after he reported for jury duty a neighbor told him that he had been investigated (fols. 421-423). On re-examination *by the prosecutor* he testified:

> "Q. Mr. Basile, I wonder if I might ask this question. This investigation in advance as defense counsel puts it, do you have any resentment about your jury qualifications being examined into by the State Police? A. No, I don't" (fol. 435).

Another juror was examined as follows:

> "Q. While we are on the subject, Mr. Oertle, of the State Police, did it come to your attention that any investigation had been made into your qualifications? A. I heard rumors to that effect, yes.
>
> "Q. Well now, what, if any effect, does that have on you? A. None whatsoever.
>
> "Q. None whatsoever. It wouldn't have any effect upon your actions as a juror in this case? A. None.
>
> "Q. If selected? A. *I was curious at the time, because I—it was before I received my notice*, and after I received my notice, why then I understood what the situation was.

"Q. Then you realize what it was? A. That is right.

"Q. I see. Well, but you are sure, aside from that, that if you are selected here, the knowledge by you that such a check or investigation was made about you, would not— A. No, none whatsoever.

"Q. —have any bearing upon what your actions were as a juror here? A. No" (fols. 452-453).

• • • • • •

"Q. Well, just so that I understand it, Mr. Oertle, when were you summoned to appear for this jury service? A. December 31st.

"Q. December 31st, 1959, right? A. Yes, nine.

"Q. And you were served by whom, if you recall? A. I wasn't home at the time, and the notice was left.

"Q. I see. A. We have several farms that we operate, and apparently the people had been to the house, *in fact mother had said that they had been down at that house a couple of times*, and apparently they didn't catch me home. So, they left it with my brother, my younger brother.

"Q. Now, prior to that date, had you heard anything about being investigated? A. Yes, I did.

"Q. And when was that, about when? A. Oh, I would say maybe a week, possibly three or four days to a week.

"Q. That would be around the Christmas holiday? A. That is right.

"Q. *And from whom did you hear that? A. That was in the local barbershop.*

"Q. And I assume that just about everything is heard around the local barbershop? A. I believe it is, isn't it?

"Q. And, who operates that barbershop? A. A fellow by the name of Larry Hunter.

"Q. And was it he that told you about it? A. Yes, it was.

"Q. And can you recall what it was that he said about it? A. Oh, only that he said that I was being drawn for jury duty. I thought he was just kidding, and I passed it off pretty much at that.

"Q. Was there anything further said concerning your qualifications or— A. No, nothing at all along those lines. What was done was just in a jokingly way, I would say, if anything" (fols. 462-464). (Italics added.)

A juror who was a rural mail carrier testified that the postmistress of the station out of which he worked told him that he had been investigated (fols. 492-494).

A juror who had previously been called to the prosecutor's office to give information testified:

"Q. I see. Alright. Now, with reference to the proposition of whether you, by any chance learned as to whether there was any investigation made concerning your qualifications to serve as a juror here, Mr. Keating, did you ever hear that any such thing did occur? A. Yes. *I knew it right at the time it was. Well, it was the trooper investigated at my home where my mother lives at the same home.*

"Q. At your own home? A. Well, it is—it is a twin house. My mother lives on one side, my wife and I live on the other side, and a trooper happened to come to that side of the house, so I was told about it the same—the same night.

"Q. I see. Well, you mean then that *whatever inquiry was made that you heard of was made by your mother?* A. Yes, that is the only one that I know of.

"Q. All right. Now, let me ask you, and did you learn from her that it was a trooper? A. Yes, he identified himself.

"Q. Yes. Now, the thing that concerns me, of course, is what effect that has on you and what effect it would have upon you as a juror in this case? A. Well, no.

"Q. Did it have any effect on you at all? A. No effect" (fols. 519-521). (Italics added.)

* * * * * *

"Q. And you—there is nothing about this Trooper having come and discussed this matter with your mother that you have carried into this room? A. Oh, no, that meant nothing, that is—" (fol. 528).

On re-examination by the *prosecution* he testified:

"Q. On your thinking in the case? A. No.

"Q. All right. Now, Counsel Shanahan brought up the fact, I believe it was Mr. Shanahan, that you had been investigated and that your mother had been asked about your qualifications. You understand that most jurors are investigated prior to their service? A. Yes.

"Mr. Abelove: I object to that, if the Court please?

"The Court: Yes, I don't think that has any place in the interrogation, Counselor. That is a statement of fact, not a question.

"Mr. Casella (Assistant Special Prosecutor): Well, would that fact—*the fact that your mother had been talked to by a person investigating your qualifications, would that in any way prejudice you against the People of the State of New York in this particular case?*

"The Witness: No, no, it wouldn't" (fols. 534-535). (Italics and parenthesis added.)

Another juror testified:

"Let me ask you, Mrs. O'Neil, did it come to your attention that any investigation was made, concerning you before you came here? A. *My neighbor come over to use the telephone, and she told me, she says, 'Well, I am not supposed to tell you, I guess, but I heard you was investigated for jury duty.'* And that was all I heard about it. And the next day they brought the notice and I wasn't home, but my daughter took it for me" (fols. 552-553). (Italics added.)

Still another juror said that he did not know that an investigation had been made with reference to him (fol. 582).

The examination of Juror Chester Mandry included:

> "Q. Did it come to your attention with reference to any prior investigation or check concerning your qualifications? A. Yes, it did.
>
> "Q. And do you mind telling us in what manner that information came to you? A. Well, my wife told me about it, she said that she talked with one of the neighbors.
>
> "Q. I see. Now, let me ask you, would the fact that such a check or investigation had been laid in the fashion that it was made, have any effect upon your ability to act as a fair, impartial and independent juror in this case? A. I don't believe so, sir" (fol. 617).

Juror Robert Calkins said it had "not the least" come to his attention that his qualifications had been checked (fol. 633). He hadn't heard about it (fol. 640).

Juror Carl Flock testified:

> "Let me ask you did it come to your attention as to whether any previous check or investigation was made of your qualifications? A. Yes.
>
> "Q. And do you mind telling us how that came to your notice? A. Well, our next door neighbor came over the same—the same day that they came to her house, and she says, 'I put you on the spot.' She says, 'I put you in the Grand Jury.' I says, 'Thanks.' And I knew it from the very same day.
>
> "Q. I see. Well now, apparently the impression you got was that it had something to do with the Grand Jury, your being on the Grand Jury, is that it, rather than a trial jury? A. Yes.
>
> "Q. Well now, Mr. Flock, you have heard me ask other jurors with reference to similar situations, does that have any effect on you, the fact that you were checked on or investigated in that fashion? A. *Well, the only thing I thought is, if they wanted to know something, why didn't they come and ask me.*

"Q. *Well, they got pretty close?* A. *Yes, I guess so.*

"Q. Well, does it have any—does it have any effect on you? A. No" (fols. 674-676). (Italics added.)

Two or three days after his neighbor told him of the investigation he received his summons to serve (fols. 684-685). This witness was peremptorily challenged by the prosecution, after being re-examined as follows:

"Q. You indicated when Mr. Shanahan inquired from you as to whether it had come to your attention that someone had inquired in your neighborhood concerning your qualifications, and your answer to Mr. Shanahan, as I recall it, was 'Well, I couldn't understand why they didn't come to me to ask the question.' A. That is right.

"Q. Do you recall that, sir? A. Yes, sir.

"Q. All right. Now, by reason of your reaction to that question I would like to determine your reaction to an inquiry from your neighbors, if you assumed that it is improper for a person to contact you directly after you had been on a jury list? Would you tell me what your reaction is or would be in those circumstances? A. Well, as long as I have set here, all I can hear is, and think, is that it is supposed to be so quiet, you are not supposed to talk to anybody else, you are not supposed to talk about the trial, *but still they will go out and they will get your neighbors in on it,* and the neighbors tell you more about it than what you know of it. So, if they had came to me and said to me, 'Now, we are going to put you on the jury, we are going to try to get you on the jury,' or this or that, I think that would be a whole lot better than *instead of spread it all over the neighborhood.*

"The Court: Let the Court state this to you. That it would be entirely improper for any of the parties to approach any individual juror. I would make that statement to you in connection with the question that Mr. Fischer has asked. That no party

can properly approach a juror. Perhaps you weren't in the courtroom, but I have made that statement to all of you, that if any party approached any one of you, you are to report that to the Court immediately. So, it is entirely improper for any party through any agent or anyone else to approach a juror. I think perhaps that might clarify your thinking a little bit on the subject.

"By Mr. Fischer:

"Q. In any event, as I understand your reaction, Mr. Flock, *by reason of the fact that there was some inquiry made in your neighborhood, it is my understanding that you have some resentment of that,* you don't like that type of thing? A. *That is right*" (fols. 702-705). (Italics added.)

Statement as to Question II.

Was the petitioner's rights violated under the Constitution of the United States by the cross examination of the witness Chapman A. Thomas?

Defendant called as a witness a Mr. Thomas. He was the senior bookkeeper in the Department of Public Works in the City of Utica (fol. 3458), and was an important witness since, among his duties, was the preparation of requisitions for material purchased by the Public Works Department including the requisitions addressed to Charles G. Kellogg Lumber Company for certain materials which were the basis of the two counts of the indictment, particularly Count Two having to do with the preparation and auditing of fraudulent requisitions, purchase orders and vouchers.

Before the trial, Mr. Thomas had been required to appear on three occasions at the office of the Oneida County Special Investigation for the purpose of giving testimony

with reference to the requisitions and orders directly at issue in the trial (fols. 3780-3785). On the first two occasions, Mr. Thomas appeared accompanied by attorneys from the Corporation Counsel's office of the City of Utica and on one occasion, answered questions contained in some fifty-five pages of testimony. On the second appearance, Mr. Thomas, as a result of some confusion with reference to the identity of the forms involved, mistakenly gave certain answers and as a result, was threatened by Mr. Weintraub, one of the staff of the Oneida County Investigation (fols. 3789-3793). As a result, Mr. Thomas, on the third appearance, corrected the testimony which he had previously given and thereafter claimed his constitutional privilege to refuse to answer by reason of the intimation that he would be indicted for perjury. This was brought out, over objection on cross examination by the prosecution. Mr. Thomas was cross examined by the prosecutor as follows:

"Q. Did you testify before the Grand Jury? A. No, I didn't.

"Q. Was that on advice of counsel? A. That was on advice of counsel.

"Q. Who was your counsel? A. Mr. Pawlinga.*

"Q. And did you discuss this case with Mr. Pawlinga? A. I did.

"Q. Did you discuss it with him before you went and were called before the Grand Jury? A. Sir?

"Q. Did you discuss it with him when you were called before the Grand Jury? A. Yes.

"Q. And before that? A. Before that.

"Q. Well, did you tell Mr. Pawlinga that you testified before the Grand Jury? A. No, I didn't.

* * * * * *

"By Mr. Fischer:

"Q. Did you tell Mr. Pawlinga before September 21st, of 1959, that you did testify before the Grand

* Mr. Pawlinga also was defense counsel herein. The question was directed to instructing the defendant.

Jury concerning vouchers and purchase orders? A. I—not the Grand Jury, at your office.

"Q. Well, did you tell him you testified before the Grand Jury concerning the purchase orders and vouchers? A. No, I did not.

"Q. You did not? A. No.

• • • • • •

"By Mr. Fischer:

"Q. Now, you testified, did you not, before the Attorney General's office on December 17th, 1959? A. I don't know just exactly the date, but I did testify.

"Mr. Fischer: I submit a copy of the minutes. I have only one copy, your Honor, for defense counsel. They can perhaps share it. And I will mark this for identification if I may.

"The Court: People's Exhibit 144 for identification.

"(Whereupon, minutes were then received and marked People's Exhibit 144 for identification.)

"By Mr. Fischer:

"Q. *When you were asked in connection with these purchase orders and vouchers before the Attorney General's office on December 17th, 1959, you refused to answer questions in connection with them on the grounds that those answers might tend to incriminate you, isn't that so?*

"Mr. Shanahan: Pardon me. Before you answer it, would you read that, please?

"(Whereupon, the last question by Mr. Fischer was then read by the reporter.)

"Mr. Shanahan: Now, what page is this? I haven't had a chance to look at this, of course.

"Mr. Fischer: Well, I am not reading from it, I am posing to him a general question. Do you understand the question?

"The Witness: I do.

"By Mr. Fischer:

"Q. All right, will you respond to it. A. I refuse to answer.

"The Court: *What? Will you repeat the question please, Mr. Hunt?*

"(Whereupon, the reporter then repeated the same question as before.)

"The Witness: *Yes.*

"By Mr. Fischer:

"Q. Well now, are you no longer of the opinion that any answers you give about those requisitions will incriminate you?

"Mr. Shanahan: Well, I object to that, if the Court please. This witness has given testimony. I submit it is argumentative.

"The Court: Overrule the objection, Counselor.

"Mr. Shanahan: Exception.

"The Court: Cross examination. Will you repeat the question please, Mr. Hunt?

"(Whereupon, the last question by Mr. Fischer was then read by the reporter.)

"The Witness: No.

"By Mr. Fischer:

"Q. You are no longer of the opinion that they will incriminate you? A. That is right.

"Q. You have since, being called before the Grand—the Attorney General's office on December 17th, you have since changed your mind, is that correct, sir? A. I could answer then but—

"The Court: Well, will you repeat—did you take the question, Mr. Light? Will you repeat it please, that last question?

"(Whereupon the last question by Mr. Fischer was then read by the reporter.)

"The Court: Answer yes or no.

"The Witness: Yes.

"By Mr. Fischer:

"Q. You have since changed your mind. Now, on page 12 of the minutes of December 17, 1959, were you asked this question and did you give this answer,

"'Did you destroy, Mr. Thomas, any copies of the purchase requisitions prepared in your department during the year 1957? A. I refuse to answer on the grounds that it might incriminate me.'

"Mr. Shanahan: Well, if the Court please, *I object to this that it is not in any manner contradictory of any testimony given by this witness, that the witness had the privilege and the right if he saw fit to exercise it to claim his privilege.* And that answer does not constitute any admission of the correctness of the question.

"The Court: I would so instruct the jury in accordance with your statement. I would state that counsel's statement is absolutely correct. However, are you objecting to the question?

"Mr. Shanahan: I do object to the question upon the ground that the only purpose for which I know, is that it's proper to cross examine a witness using previous testimony is when the testimony contradicts the testimony given at a later time by that same witness. And my point is, of course, that the answer as read does not have the effect of being contradictory and, therefore, that it is incompetent and improper.

"The Court: I will certainly instruct the jury in accordance with the statement made by Mr. Shanahan. With reference to this characterization of the effect of the taking of this constitutional privilege by the witness. However, any previous acts or statements or declarations of the witness in his course of life are admissible in this examination. And I will allow the question and direct the witness to answer.

"Mr. Shanahan: Well, your Honor, I have no desire to argue the matter at this time, and ask that it be held in abeyance however, until I get an

opportunity to do—*I am very sure that I can call to your Honor's attention some decisions indicating that a claim of privilege is not a proper means, that is, to show a previous claim of privilege is not proper method to cross examine.* And that is the only purpose for which this could be used, would be contradict. I don't go along with your Honor on the proposition that anything—

"The Court: You say you have no authority at this time, Counselor?

"Mr. Shanahan: I don't have any in my hand, I didn't anticipate this.

"The Court: We will take a short recess.

* * * * * *

"(Proceedings after recess.)

"The Clerk: If the Court please, the defendants, the jury and the attorneys and the witness in the box, are all present.

"The Court: All right. Would you repeat the last question, Mr. Light?

"(Whereupon, the last question and answer were then read by the reporter.)

"The Court: I will reserve on that, you may proceed.

"Cross Examination by Mr. Fischer (Continuing):

"Q. All right, sir. I will withdraw that, the question now, in any event, for the record" (fols. 3587-3609). (Italics added.)

The foregoing cross examination occurred on Friday and thereafter, adjournment was taken until the following Monday morning, at which time certain authorities were submitted to the Court indicating such examination to be improper and a motion was then made for a mistrial in view of the improper questions and examination at the previous session of court. The Court denied the motion (fols. 3644-3690).

Earlier in the trial, the prosecution called as a witness, Dominick Padula, a carpenter employed by the City of Utica. On cross examination, the prosecution developed over objection that the witness appeared at the Attorney General's office and refused to answer certain questions propounded to him upon the ground that his answers might tend to incriminate him (fols. 1341-1355).

On February 17th, 1960, the jury found the petitioner guilty.

Questions Presented.

As mentioned above, the following questions are presented to this Court:

I. Have the petitioner's rights under the due process clause of the Fourteenth Amendment of the United States Constitution been violated when the Trial Court denied his motion for a discharge of the jury panel and for an adjournment to permit defense counsel to establish that the State Police investigation of the prospective jurors was improperly conducted to the prejudice of the petitioner?

II. Was the petitioner's rights under the due process clause of the Fourteenth Amendment of the United States Constitution violated when the Trial Court denied his motion for a mistrial based on a line of questioning pursued by the prosecution in the cross examination of the witness, Chapman A. Thomas?

Reasons for Granting the Writ as to the First Question:

The motion and the response thus presented the Court with this situation: Counsel for the defense, as an officer of the Court, made a charge that the prosecution through the members of the State Police assigned to its staff had

conducted an unauthorized, illegal and prejudicial investigation of the members of the panel of trial jurors all of whom had already been investigated, drawn and certified to the Court as qualified by the Commissioner of Jurors (Judiciary Law, Sections 651, 657, 658, 659, 660, 661, 662, 667, 668, 669, 671); unauthorized—because the sections of the law cited vest in the Commissioner of Jurors the exclusive power to determine by investigation the qualifications of prospective jurors prior to the *voir dire* examination; illegal—because not authorized and also because even the Commissioner of Jurors is barred from inquiring into the religion, church attendance, political views and racial or ethnological prejudices of prospective jurors (Judiciary Law, Section 661; Code of Fair Practices for the Executive Branch of the New York State Government, Article VII—promulgated by Governor Rockefeller*; N. Y. Const., Art. 1, Section 11; U. S. Const., Amend. XIV, Section 1); prejudicial—because it was an unauthorized and prohibited official intrusion into the privacy of the jury, and presumptively prejudicial, particularly since the qualifications of its members had already been determined by the only agent of the government authorized to make such a determination prior to the *voir dire* examination (*Gold v. United States*, 352 U. S. 985; *Remmer v. United States*, 350 U. S. 377, 347 U. S. 227; *Sinclair v. United States*, 279 U. S. 749). "In a criminal case any private communication, contact or tampering, directly *or indirectly*, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial, if not made in pursuance of known rules of the court * * * with full knowledge of the parties" (347 U. S. 229). "* * * It is the law's objective to operate as freely

* "All state agencies shall avoid in forms or requests for information any item or inquiry expressing any limitation or specification as to race, color, creed, national origin or age unless the item or inquiry is expressly required by statute or is required in good faith for a proper purpose and prior notification of its use has been given by the agency to the State Commission Against Discrimination."

as possible from outside unauthorized intrusions purposefully made" (350 U. S. 382). *"The mere suspicion that he, his family and friends are being subjected to surveillance by such persons is* enough to destroy the equilibrium of the average juror and render impossible the exercise of calm judgment upon patient consideration" (279 U. S. 764). (Italics added.)

The only response the prosecution made to the charge was an expression of personal opinion that inquiries were not made "in connection with people of Italian extraction," and expression of personal opinion that there had to be a further check on the jurors to determine whether any had a felony or misdemeanor conviction, an expression of personal opinion that the charges could not be tested without papers, and a personal assertion that none of these matters had come to the attention of the prosecution.

Thus, it was not denied that the prosecution had indirectly, and without authority, intruded on the privacy of the jurors to the extent of State Police inquiries as to their religion, habits of worship and political views. Nor was it denied that this was done in such a way as to come to the attention of the jurors. In addition, an issue of fact was raised as to whether the inquiry extended to the jurors' views as to Italians or people of Italian extraction. Petitioner's name discloses his origin.

The only justification offered for the investigations made by the State Police was the unsubstantiated general assertion that there was need for ascertaining whether the jurors had previous convictions. It must be presumed that the Commissioner of Jurors had previously performed his duty in this respect. Furthermore, the charge was not that any inquiry was made as to whether the jurors had felony or misdemeanor convictions (conviction of a misdemeanor is not a disqualification unless it involves moral

turpitude, Judiciary Law, Section 662), but even if the charge had encompassed such an inquiry, there was no assertion of any need for such an inquiry extending to State Police contact of relatives, neighbors and community *associates of the jurors.* (Italics mine.)

In the brief for respondent on the appeal to the Court of Appeals much was made of the fact that the defense accepted these jurors and did not challenge them for cause. Overlooked was the fact that the Court had already rejected a motion to discharge these jurors for cause and the fact that each juror accepted said that he would not be influenced by the fact that he was investigated. Much also was made in respondent's brief in the Court of Appeals of the fact that when the jury was accepted the defense had six unused peremptory challenges. Overlooked was the fact that the defense could not have secured an uninvestigated jury even if it had used all of the peremptory challenges and the fact that accepted trial practice and sound judgment dictated that peremptory challenges be reserved and not used upon the first twenty jurors called, particularly where the Court had denied a motion to dismiss the panel for cause and had even refused to hold a requested hearing as to whether cause for dismissal existed.

As shown above, the result of the procedure the Court forced upon the defense was that all the prospective jurors were made aware of the fact that the State Police had conducted an unauthorized and illegal investigation of their religious, political and ethnological views. See folios 5599-5600, 5640, 5865-5869, 5884-5885.

There is no question that the Trial Judge approved of the investigation the state police made of the jurors, and that he made known his approval to the jurors. See folios 460-461, 704-705.

As to Second Question:

II. The Trial Court deprived defendant of his constitutional right to a fair trial when it denied defense counsel's motion for a mistrial after it had permitted a defense witness's prior claim of constitutional privilege against self-incrimination to be used, over objection, to attack his credibility.

The only purpose the prosecution could possibly have had in asking defense witness Thomas whether he had refused to answer questions (put to him by prosecution at the Attorney General's office) on the ground that his answers might tend to incriminate him was that of prejudice or attack on the credibility of the witness. As the Court of Appeals said in *People v. Ashby*, 8 N. Y. 2d 238, 241:

> **"No one will now question the generality expressed in *Halpern v. United States (supra)* (353 U. S. 391), that a citizen's assertion of his constitutional right to refuse to incriminate himself cannot afterwards be the basis of an attack on his credibility." (See 98 C. J. S., Section 464, p. 332.)**

In the *Ashby* case the Court of Appeals held that the question as to the witness's prior claim of privilege was proper because the defense had previously made an issue out of the witness's willingness to talk and tell the true facts.

In the prosecution's brief to the Court of Appeals in the case at bar, it was admitted that "there are clear factual distinctions between *Ashby* and present facts" but nonetheless it was sought to have the Court come to the same conclusion, i. e., that the defense had opened the door to such line of questions. Here the defense did no such thing. It merely asked if the witness had testified before the Grand Jury and the answer was no or if the witness

had testified before the Attorney General and the answer was yes (fols. 3510-3511). Both answers were correct. There was no attempt to show by the witness himself "that he had been ready to talk but that the prosecutor, to fob off a complete investigation had failed to use him as a witness" (8 N. Y. 2d 241).

The main ground taken by the prosecution in its brief to the Court of Appeals for a holding by the Court that the defendant's and witnesses' constitutional rights were not impaired by the question as to prior claim of privilege was that the question was unanswered. *That is not true.* As the foregoing quotation from the record shows, the question was asked and answered. Furthermore, the question and answer were read back in the jury's presence at the direction of the Court at least twice (fols. 3596-3609).

It was also argued in the Court of Appeals that the defense failed to make a proper objection to this line of questions. On this, the record, set forth above, is clear and speaks for itself.

The record also shows that the prosecution pursued over objection the same line of questions in respect of another witness (fols. 1341-1355).

CONCLUSION.

For the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

ANTHONY J. FERNICOLA.

Date:

APPENDIX.

Penal Law.

Section 1864: Obtaining proceeds of fraudulent audit or payment.

A person who, being or acting as a public officer or otherwise, by wilfully auditing, or paying, or consenting to, or conniving at the auditing or payment of a false or fraudulent claim or demand, or by any other means, wrongfully, obtains, receives, converts, disposes of or pays out or aids, or abets another in obtaining, receiving, converting, disposing of, or paying out any money or property, held, owned, or in the possession of the state, or of any city, county, or village, or other public corporation, or any board, department, agency, trustee, agent or officer thereof, is guilty of a felony, punishable by imprisonment for not less than three nor more than five years, or by a fine not exceeding five times the amount or value of the money or the property converted, paid out, lost or disposed of by means of the act done or abetted by such person, or by both such imprisonment and fine. The amount of any such fine when paid or collected, shall be paid to the treasury of the corporation or body injured. A conviction under this section forfeits any office held by the offender, and renders him incapable thereafter of holding any office or place of trust.

A transfer in whole or part of any deposit with any bank or other depository, or of any credit, claim or demand upon such depository, whereby the right, title or possession of the owner or holder of such deposit, or of any custodian thereof, is impaired or affected, is a conversion thereof under this section.

§1294. Grand larceny in first degree

A person is guilty of grand larceny in the first degree, who steals, or unlawfully obtains or appropriates, in any manner specified in this article:

1. Property of any value, by taking the same from the person of another in the night time; or,

2. Property of the value of more than twenty-five dollars, by taking the same in the night time from any dwelling house, vessel, or railway car; or,

3. Property of the value of more than five hundred dollars, in any manner whatever.

Code of Criminal Procedure.

Section 366. Denial of Challenge, How made, and Trial thereof.

If the challenge be denied, the denial may, in like manner, be oral, and must be entered upon the minutes of the court; and the court must proceed to try the question of fact.

Section 367. Who may be examined on trial of challenge.

Upon the trial of the challenge, the officers, whether judicial or ministerial, whose irregularity is complained of, as well as any other persons, may be examined to prove or disprove the facts alleged as the ground of the challenge.

Judiciary Law.

§659. Examination as to fitness

No person's name shall be entered on a jury ballot or list unless he has stated to the commissioner, in a certificate or questionnaire pursuant to section twelve hundred thirty-two-a of the penal law, his qualifications in writing in his own hand and has signed such certificate or questionnaire.

In order to *ascertain a juror's qualifications*, the commissioner may either

(1) mail to the prospective juror a questionnaire form on which to enter the name, address, occupation, claims for exemption and such other questions as the law may require, which the person to whom the questionnaire is mailed must fill out in his own hand, sign and return within one week to the commissioner; or

(2) summon the prospective juror to appear before him for the purpose of filling out the questionnaire and testifying as to the competence, qualifications, eligibility and liability of himself or any other person to serve as a juror and to present claims for exemption or disqualification. Such person shall not be entitled to any fee or mileage when responding for such purpose. Such summons may be served personally or by leaving it at the person's residence or place of business with a person of suitable age and discretion, or by mail. If served personally or by substitution the summons shall require the person summoned to attend not less than three days after service. If served by mail the summons shall require the person summoned to attend not less than five days after the mailing thereof.

One or more successive summonses may be served upon the same person when he fails to attend as required by a former summons. When a person has so attended twice

and furnished all information required, he shall not be required to attend again for one year thereafter.

The commissioner may, in his discretion, dispense with examination of the person so notified where another person cognizant of the facts is produced and testifies in his stead and it appears from the testimony of such other person that the person notified is disqualified, not qualified or exempt.

The commissioner may, in his discretion, forward to any appropriate police authorities within the county for checking against the records of such authorities, the names of any or all persons found otherwise qualified by him for jury service.

Notwithstanding the foregoing provisions of this section, the justices of the appellate division may by rule require that, in any county contained within their respective departments,

(a) the questionnaires required in accordance with option numbered (1) above shall be filled out in the prospective juror's own hand, signed and returned to the commissioner.

(b) each prospective juror shall be personally examined by the commissioner,

(c) the names of prospective jurors found otherwise qualified shall be forwarded by the commissioner to the appropriate police authorities within the county for checking against the records of such authorities. Added L. 1954, c. 305, §1; amended L. 1955, c. 797, §1, eff. July 1, 1955. (Italics mine.)

New York Constitution.

Article 1, Section 2. Trial by jury; how waived.

Trial by jury in all cases in which it has heretofore been guaranteed by constitutional provision shall remain inviolate forever; but a jury trial may be waived by the parties in all civil cases in the manner to be prescribed by law. The legislature may provide, however, by law, that a verdict may be rendered by not less than five-sixths of the jury in any civil case. A jury trial may be waived by the defendant in all criminal cases, except those in which the crime charged may be punishable by death, by a written instrument signed by the defendant in person in open court before and with the approval of a judge or justice of a court having jurisdiction to try the offense. The legislature may enact laws, not inconsistent herewith, governing the form, content, manner and time of presentation of the instrument effectuating such waiver. Amended by Constitutional Convention of 1938; approved by the people Nov. 8, 1938.

Exhibit A.

Order Granting Enlargement of Time.

STATE OF NEW YORK,

IN COURT OF APPEALS.

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the twentieth day of October A. D. 1960.

Present,

HON. CHARLES S. DESMOND, *Chief Judge, presiding.*

Mo. No. 587

THE PEOPLE &c.,

Respondent,

vs.

JOSEPH N. BOLLETTIERI,

Appellant.

A motion having heretofore been made herein upon the part of the appellant for enlargement of the time within which to argue the above entitled appeal to this Court and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is granted and the case set down for argument during the November, 1960, session of this Court, appellant's brief to be served and filed not later than November 1, 1960.

A copy

RAYMOND J. CANNON
Clerk

Exhibit B.

Order to Show Cause and Supporting Affidavit of John R. Davison.

STATE OF NEW YORK,

COURT OF APPEALS.

CLERK'S OFFICE

I, RAYMOND J. CANNON, Clerk of the Court of Appeals of the said State of New York, do hereby certify that I have compared the annexed copy of Affidavit and Order to Show Cause in People of the State of New York, Respondent, against Joseph N. Bollettieri, Appellant, with the original on file in this office, and that the same is a correct transcript therefrom, and of the whole of said original.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals, at the City of Albany, this twenty-fifth day of April A. D., 1961.

RAYMOND J. CANNON
Clerk

STATE OF NEW YORK,

COURT OF APPEALS.

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

JOSEPH N. BOLLETTIERI,

Defendant-Appellant.

An appeal having been taken to this court and on January 5, 1960 the judgment of the Appellate Division Fourth Judicial Department affirming the judgment of the Supreme Court Oneida County convicting the defendant of the crimes of violation of Sections 1294 and 1864 of the Penal Law having been affirmed by this court and it having been made to appear that in the event such affirmance shall stand upon re-argument review will be sought in the Supreme Court of the United States, now, upon the annexed affidavit of John R. Davison sworn to on the 9th day of January, 1961 and after hearing John R. Davison, Esq. in support of this motion and Maxwell Spoont, Esq., opposed, it is

ORDERED, that the respondent show cause at a session of the Court of Appeals to be held on the 20th day of February, 1961:

1. Why re-argument should not be granted herein and if granted,

2. Why a stay of execution of the judgment herein pending the determination on re-argument should not be granted, and if re-argument be not granted,

3. Why the remittitur of this court should not be amended as specified in the annexed affidavit, and meantime, sufficient reason appearing therefor, it is

FURTHER ORDERED, that all proceedings to enforce the judgment herein be and they hereby are stayed until the hearing and determination of this motion, and it is

FURTHER ORDERED, that bail as presently fixed be and the same hereby is continued.

s/ Service hereof on or before Jan. 16, 1961 will be sufficient.

Albany, Jan. 12, 1961.

s/ CHARLES S. DESMOND
Chief Judge.

STATE OF NEW YORK,

COURT OF APPEALS.

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

against

JOSEPH N. BOLLETTIERI,

Defendant-Appellant.

State of New York,
County of Albany, ss:

JOHN R. DAVISON, being duly sworn, says:

1. I am an attorney admitted to practice in the courts of this State and I have been engaged by Anthony J. Fernicola, Esq. substituted attorney for defendant-appellant to act as counsel on this application.

2. Pursuant to permission granted by Hon. John Van Voorhis, an Associate Judge of this Court, defendant appealed to this court from a judgment of the Appellate Division Fourth Judicial Department affirming without opinion a judgment of the Supreme Court Oneida County convicting defendant of the crimes of violation of Sections 1294 and 1864 of the Penal Law.

3. On January 5, 1961 this Court affirmed without opinion the judgment so appealed from.

4. Defendant-appellant hereby requests an order that respondent show cause: Why re-argument should not be granted and, if granted, why a stay of execution of the judgment pending the determination on re-argument should

not be granted and, if re-argument be not granted, why the remittitur of this Court should not be amended to show that upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States.

5. This motion is brought on by this application for an order to show cause because, in order to protect the rights of defendant-appellant, an order must be issued staying all proceedings to enforce the judgment pending hearing and determination of this motion and continuing bail as presently fixed, and because time and the size of the record do not permit deponent to make a detailed examination of the points which this Court may have overlooked or misapprehended in affirming the judgment appealed from.

6. On the appeal defendant-appellant raised, and this Court necessarily passed upon, the following substantial questions under Amendment XIV of the Constitution of the United States:

(a) Did the Trial Court deprive defendant of his Constitutional right to be tried by a fair and impartial jury when, despite undenied specific charges of acts on the part of the prosecution which could have influenced the panel of jurors, it denied a motion by defendant's counsel that the panel be discharged and a new one selected on the sole ground that there was no "direct showing that there was some improper approach to these jurors themselves" (F. 153) no "showing of some influence being brought to bear from some source on any one of these individual jurors" (F. 156) and denied defense counsel's motion for a short adjournment to produce such proof on the sole ground that the matter was properly "the subject of inquiry in the examination of jurors" (FF. 153-160).

(b) Did the Trial Court prejudice the Constitutional rights of the defendant in requiring and permitting in the presence of the panel exploration of the influence upon each member as the result of the investigation made of them by the State Police.

(c) Did the Trial Court deprive defendant of his Constitutional right to a fair trial when it denied defense counsel's motion for a mistrial after it had permitted a witness's prior claim of Constitutional privilege against self-incrimination to be used over objection to attack his credibility (FF. 3601-3690).

7. In addition defendant-appellant raised on the appeal substantial questions whether the conduct of the prosecution in making improper use of the evidence in his summation constituted reversible error (FF. 4585-4602; 5280-5283; 5401-5402) and whether the Trial Court committed reversible error in submitting to the jury over objection the question whether certain witnesses were accomplices (FF. 5355-5359; 5386) and in refusing to charge that they were accomplices as matter of law, particularly William Kirk, whose testimony was read back to the jury at his request (FF. 5415-5430).

8. Prior to the return day of the order to show cause, submitted herewith, a printed brief will be filed with the Court showing why re-argument should be granted. The brief will bring to the Court's attention cases later than those submitted on the appeal. For example, *Gold v. United States*, 352 U. S. 985; *Remmer v. United States*, 347 U. S. 227; *Stone v. United States*, 113 F. 2d 70.

9. For the purpose of this motion attention is called to these facts of record: On the opening day of the trial, before the selection of a jury, application was made to the Trial Court for the discharge of the panel of jurors because: An investigation had been made by members of the New York State Police on behalf of the prosecution

of the individual members of the jury panel in such a manner that the fact of such investigation would, of necessity, have become known to them and would be likely to have the effect of coercing them to the prejudice of the defendants. Members of the New York State Police, had made inquiry, from, in some instances, next-door neighbors, business associates, or close relatives of the members of the jury panel. Such inquiry was conducted in such a manner as to clearly identify the persons making such investigation as police officers and that such inquiry was made in connection with the particular case which the jurors were selected to hear. The investigation consisted of calling upon various individuals, connected as aforesaid with the members of the panel, and questioning said individuals with the use of a prepared questionnaire wherein information was sought as to the nationality, religion, political affiliations of the prospective jurors and other matters, including the possibility of any prejudice against persons of Italian origin. The manner of conducting this inquiry was clearly intended that the prospective jurors should become aware of the fact that such an investigation was made and was therefore bound to have some effect upon their action as jurors in the trial of the cases against these defendants, scheduled to be heard by that particular panel. The prosecution conceded that an investigation of the type charged had in fact been made.

Prior to the commencement of the selection of a jury, defense counsel asked for an adjournment until the following day in order to bring before the Court witnesses to establish the truth of the statements made by defense counsel as the basis for their application to the Court and assurance was given to the Court that in the event of such an adjournment, proof would be forthcoming at any time the Court would be willing to hear it (FF. 135, 144, 150). The Court denied the application for an adjournment to enable the defense to produce proof as offered and directed that the selection of the jury begin (F. 145).

In denying the application, the Trial Court held that the matter of the State Police investigation could be included in the questioning of jurors concerning their qualification to serve (FF. 145-148). The inevitable result by this procedure was to acquaint all of the members of the panel with the type of investigation objected to although many of the prospective jurors may have been up to that time, unaware of any investigation of them, or their fellow members of the panel (F. 148). As a result, all of the members of the panel became aware of the investigation and the manner in which it was conducted by members of the State Police Department and undoubtedly came to the conclusion that they as well had been investigated in the same manner. During the entire examination of jurors, all unexcused prospective jurors were in the courtroom listening to the *voir dire* examinations.

* * * * *

Mr. Thomas was called as a witness by the defendant. Before the trial, Mr. Thomas had been required to appear on three occasions at the Office of the Oneida County Investigation for the purpose of giving testimony with reference to the requisitions and orders directly at issue in the trial (FF. 3780-3785). On the third occasion, he corrected the testimony which he had previously given and thereafter claimed his Constitutional privilege to refuse to answer by reason of the intimation that he would be indicted for perjury. This was brought out, over objection, on cross examination by the prosecution.

Earlier in the trial, the prosecution called as a witness, Dominick Padula, a carpenter employed by the City of Utica. In his cross examination, it was developed under the authority of *People v. Savvides*, 1 N. Y. 2d 554, that he had been granted immunity. On re-direct examination, the prosecution developed over objection that the witness appeared at the Attorney General's office and refused to answer certain questions propounded to him upon the

ground that his answers might tend to incriminate him (FF. 1341-1355).

If re-argument is denied defendant intends to seek review in the Supreme Court of the United States of the foregoing questions under the United States Constitution which were raised on the appeal.

10. Therefore, the remittitur of this Court should be amended, if re-argument be denied, to state that upon the appeal there were presented and necessarily passed upon questions under Amendment XIV of the Constitution of the United States, viz.,

(a) Did the Trial Court deprive defendant of his Constitutional right to be tried by a fair and impartial jury when, despite undenied specific charges of acts on the part of the prosecution which could have influenced the panel of jurors, it denied a motion by defendant's counsel that the panel be discharged and a new one selected on the sole ground that there was no "direct showing that there was some improper approach to these jurors themselves" (F. 153) no "showing of some influence being brought to bear from some source on any one of these individual jurors" (F. 156) and denied defense counsel's motion for a short adjournment to produce such proof on the sole ground that the matter was properly "the subject of inquiry in the examination of jurors" (FF. 153-160).

(b) Did the Trial Court prejudice the Constitutional rights of the defendant in requiring and permitting in the presence of the panel exploration of the influence upon each member as the result of the investigation made of them by the State Police.

(c) Did the Trial Court deprive defendant of his Constitutional right to a fair trial when it denied defense counsel's motion for a mistrial after it had permitted a witness's prior claim of Constitutional privilege against

self-incrimination to be used over objection to attack his credibility (FF. 3601-3690).

11. The jury returned its verdict against defendant on February 17, 1960, and on motion of the prosecutor he was committed pending sentence (FF. 5290, 5503-5517).

12. Defendant was sentenced on February 23, 1960 to be confined in Attica State Prison for not less than five or more than ten years (F. 5536).

13. Deponent is informed that defendant immediately upon being sentenced was taken to the county jail in Rome, N. Y. and was confined there until March 15, 1960, on which date Hon. Donald T. Gorman, Justice of the Supreme Court of the State of New York, granted a certificate of reasonable doubt and admitted him to bail in the sum of $10,000.00; that on July 1, 1960 the Appellate Division Fourth Department affirmed the judgment of conviction and that on July 12, 1960 Hon. John Van Voorhis, one of the judges of this Court, granted defendant permission to appeal and permitted defendant his freedom on bail as presently fixed.

14. Defendant is 44 years of age, married, and has had no previous conviction (FF. 124-125).

15. Defendant should continue to enjoy his freedom on bail as presently fixed pending determination of this motion whereby defendant presents serious questions as to the legality of his conviction and seeks further consideration by this Court of those questions and amendment of its remittitur in the event that re-argument is denied so that he can make application to the Supreme Court of the United States for review of the questions raised under the Constitution of the United States.

16. No previous application has been made to any court or judge for the relief herein asked.

WHEREFORE, it is respectfully requested that an order be issued requiring respondent to show cause at a session of the Court of Appeals to be held on the 20th day of February, 1961:

1. Why re-argument should not be granted herein and if granted,

2. Why a stay of execution of the judgment pending the determination on re-argument should not be granted, and if re-argument be not granted,

3. Why the remittitur of this Court should not be amended as above specified; that an order be issued staying all proceedings to enforce the judgment herein until the hearing and determination of this motion; and that an order be issued continuing the bail as presently fixed.

s/ JOHN R. DAVISON

Sworn to before me this
9th day of January, 1961
s/ GERTRUDE E. MAIN
Notary Public, State of New York
Residing in Albany County
Commission Expires March 30, 1962

Affidavit of Personal Service.

State of New York,
County of Albany, ss:
City of Albany,

ANTHONY J. FERNICOLA, being duly sworn, deposes and says that he served the within order & papers attached thereto upon the following named Maxwell Spoont, at Albany, N. Y. at the following times and places viz: on Jan. 12, 1961 at Albany, N. Y. by delivering to and leaving with Maxwell Spoont personally a true copy thereof, and deponent further says that he knew the person so served to be the same person mentioned and described in the said order as Attorney for Respondent therein, and that at the times of making such service deponent was over twenty-one years of age.

ANTHONY J. FERNICOLA

Sworn to before me, this
12 day of Jan., 1961
s/ RAYMOND J. CANNON
Notary Public, State of New York
My Commission expires 3/30/62

Exhibit C.

Order Granting Motion.

STATE OF NEW YORK,

IN COURT OF APPEALS.

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the second day of March A. D. 1961.

Present,

HON. CHARLES S. DESMOND, *Chief Judge, presiding.*

Mo. No. 96

THE PEOPLE, &c.,

Respondent,

vs.

JOSEPH N. BOLLETTIERI,

Appellant.

A motion to amend the remittitur in the above cause having been heretofore made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had:

ORDERED, that the said motion be and the same hereby is granted. Return of the remittitur requested and, when returned, it will be amended by adding thereto the following:

Upon the appeal herein there were presented and necessarily passed upon questions under the Constitution of the United States, viz.: Defendant contended that his rights to due process under the Fourteenth Amendment were violated when the trial court denied his motion for a discharge of the jury panel and for an adjournment to permit defense counsel to establish that the State Police investigation of the prospective jurors was improperly conducted to the prejudice of defendant, and when the trial court denied his motion for a mistrial based on a line of questioning pursued by the prosecution in the cross examination of the witness, Chapman A. Thomas. The Court of Appeals held that there was no violation of defendant's rights.

And the County Court of Oneida County is hereby requested to direct its Clerk to return said remittitur to this Court for amendment accordingly.

A copy

GEARON KIMBALL
Deputy Clerk

Exhibit D.

Order Amending Remittitur.

STATE OF NEW YORK,

IN COURT OF APPEALS.

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the second day of March A. D. 1961.

Present,

HON. CHARLES S. DESMOND, *Chief Judge, presiding.*

Mo. No. 96

THE PEOPLE, &c.,

Respondent,

vs.

JOSEPH N. BOLLETTIERI,

Appellant.

The judgment of the Appellate Division affirming the judgment of the Supreme Court, Oneida County, convicting the defendant, Joseph N. Bellettieri, of the crimes of grand larceny first degree and obtaining the proceeds of a fraudulent audit, having been affirmed by this Court on the fifth day of January, 1961, and a motion to amend the remittitur to show that on said appeal there were presented and necessarily passed upon questions under the Constitution of the United States being granted herewith and

it having been made to appear in the papers on said motion that review of said affirmance will be sought in the Supreme Court of the United States, papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that all proceedings to enforce the judgment herein be and they hereby are stayed pending the hearing and determination of a petition for certiorari to the Supreme Court of the United States and, it is

ORDERED, that bail as presently fixed be and the same hereby is continued; it is further

ORDERED, that the stay granted hereby shall become inoperative and of no effect immediately upon the expiration of the time limited for an application for certiorari if no application is then pending.

A copy

RAYMOND J. CANNON,
Clerk

Exhibit E.

Order Denying Re-argument.

STATE OF NEW YORK,

IN COURT OF APPEALS.

At a Court of Appeals for the State of New York, held at Court of Appeals Hall in the City of Albany on the second day of March A. D. 1961.

Present,

HON. CHARLES S. DESMOND, *Chief Judge, presiding.*

Mo. No. 96

THE PEOPLE, &c.,

Respondent,

vs.

JOSEPH N. BOLLETTIERI,

Appellant.

A motion for a re-argument of the above cause having been heretofore made upon the part of the appellant herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is denied.

A copy

RAYMOND J. CANNON
Clerk